Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DONZELL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of the judicially imposed "*Feres* doctrine" is appropriate in medical malpractice claims brought by military personnel when Congress enacted the Federal Tort Claims Act (hereinafter FTCA) to only prohibit lawsuits by service personnel against the United States for injuries arising out of combatant activities.

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PETITION FOR WRIT OF CERTIORARI

Donzell Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case and overturn the "*Feres* doctrine" in medical malpractice claims against military medical providers.

OPINIONS BELOW

The opinion of the Court of Appeals (referred to herein as "*Jones Appeal*") appears at Appendix A to the petition and is reported at 112 F.3d 299 (1997).

The opinion of the district court appears at Appendix B to the petition and does not appear to have been officially reported.

JURISDICTION

The Court of Appeals entered its judgment and order on April 24, 1997. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 2674 of the Federal Tort Claims Act provides, in pertinent part, that "the United States shall be liable, respecting the provisions of the title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ." Section 2680 of the Federal Tort Claims Act, provides, in pertinent part, an exception stating this chapter will not apply to "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during times of war." The texts of these sections are set forth at Appendix D.

STATEMENT

Donzell Jones initiated this case to seek compensation for the injuries he sustained as the result of alleged medical malpractice in a Naval hospital. Sergeant Jones, an outstanding track athlete, voluntarily joined the Army in 1986. As a result of his phenomenal athletic ability, Donzell Jones earned a chance to compete in the United States Military Olympic tryouts in the San Francisco/ Oakland California area in 1992. While there, Sergeant Jones began to experience stomach pain. After initially seeking medical attention in an Army hospital at the Presidio, he was transferred to Oakland Naval Hospital where on June 22, 1992, he had surgery performed to relieve his stomach pain. During the surgery, compression leg stockings were applied to prevent permanent damage from loss of blood circulation to the lower legs. The stockings were not adequately checked and the lack of blood to his legs caused bilateral compartment syndrome, a devastating injury causing permanent leg damage. Ironically, his dream of participating in the Olympics turned into a never-ending nightmare, because now it is not only impossible for Donzell Jones to run, but it is also extremely difficult for him to even walk.

Donzell Jones' surgery was not the result of a war or of a combatant activity. Additionally, his decision to see military doctors was not a result of personal preference, but like many civilians who are covered by employer-provided HMO's or other forms of managed health care, was based upon where his employer's "insurance plan" would provide coverage; in this case, military hospitals. Most importantly, the negligence that he complains of is medical neglect and the failure to carry out duties that every physician owes to a patient. These facts and the

plain words of the FTCA seem to clearly provide Donzell Jones with a method to seek redress for the wrong but for the judicially created *Feres* doctrine.

PROCEEDINGS BELOW

The initial complaint filed in this action specifically sought to challenge the *Feres* doctrine. Exhibit D-5. Congress enacted to eliminate the doctrine of sovereign immunity as applied to the Federal government. *Feres* is a judicially created interpretation of an exception to the FTCA. The district court granted defendant's motion to dismiss for lack of subject matter jurisdiction based on the doctrine set forth in *Feres v. United States*, 340 U.S. 135 (1950). According to the trial judge, Donzell Jones' injury in a naval hospital satisfied the *Feres "incident to service"* test. The court ruled that Jones' use of the military hospital was based ". . . solely by virtue of his status as a serviceman . . .," and hence his injury was "incident to service." Appendix B-4.

The Court of Appeals' affirmance was likewise based upon the *Feres* doctrine. In stating its approval of the district court's decision, the court stated:

> "Once it is determined that a servicemember . . . was on active duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial inquiry ends."

The appeals court concluded by stating:

> "We have consistently found that a service-member's injury is incident to military service whenever the injury is incurred while the individual is on active duty or subject to military discipline."

112 F.3d at 302; Appendix A-6 and A-7.

REASONS FOR GRANTING THE PETITION

The *Feres* doctrine should be revisited by this Court because of the inconsistent applications of the *Feres* doctrine among the circuits since this Court last spoke out on the doctrine in *United States v. Johnson*, 481 U.S. 681 (1987). The reasoning of the Seventh Circuit in *Jones Appeal* is also followed in the First and Tenth Circuits, and directly conflicts with decisions in the Fourth, Fifth, Ninth, and Eleventh Circuits and with earlier decisions of this Court. The Seventh Circuit has stated that "*Feres* is alive and well." *Duffy v. United States*, 966 F.2d 307 (7th Cir. 1992). *Feres*, however, should be dead and buried in medical malpractice cases.

A. Conflicts Among the Circuits Result in Disparate Decisions

"Shopping the circuits" has taken on a new meaning since the last Supreme Court decision on a *Feres* case. Although this Court attempted to put the *Feres* doctrine to rest in *United States v. Johnson*, 481 U.S. 681 (1987), the circuits have been unable to develop consistent standards to determine if cases are *Feres* barred. In the Fourth, Fifth, Ninth, and Eleventh Circuits, a more liberal and encompassing standard is used to determine the applicability of the *Feres* doctrine. In particular, these circuits do not treat active duty status as the deciding factor when determining if the suit is *Feres* barred.

In the Ninth Circuit, active duty status is not the deciding factor. In *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991), three airmen broke into the plaintiff's office during the middle of the night and stole her personal letters which they later copied and distrib-

uted to various squadron personnel. *Id.* at 1479. The plaintiff-Commander filed suit alleging that the sergeants were attempting to ruin her reputation and career. *Id.* In response, the Government argued that *Feres* barred the plaintiff's case because she was on active duty at the time of the injury and also that she was subject to military discipline. *Id.* at 1485. The Ninth Circuit expressly refused to solely apply these criteria, because such broad indicators would operate to disallow claims by servicemen entirely. *Id.* Such a sweeping rule was expressly rejected by the Supreme Court in *Stanley v. United States*, 483 U.S. 669 (1987). *Id.* The court ruled that the presence of active-duty status or subjection to military discipline is insufficient standing alone to invoke *Feres*. *Id.* at 1486. Unlike the First, Seventh and Tenth Circuits, the Ninth Circuit examined other factors, such as whether the injury was derived from on-the-job activities and whether the act served some military purpose. *Id.* at 1487. Since the perpetrator's duties did not require them to steal personal letters from a locked area in their Commander's office and the theft did not serve any conceivable military purpose, the court ruled that her injury was not "incident to service" and was consequently not *Feres* barred. *Id.* at 1486. Accordingly, suits in the Ninth Circuit are examined more extensively than merely inquiring as to the duty status of the servicemember at the time of injury.

The broad consideration that the Ninth Circuit affords *Feres* cases can also be seen in *Dreier v. United States*, 95 F.3d 1435 (9th Cir. 1996). In this recent case, the off-duty servicemember was relaxing in a recreational area that was limited to military members and civilians who had obtained a permit. *Id.* at 1438. After sunbathing,

swimming and drinking beer, the servicemember and some of his friends decided to take a walk in the area. *Id.* During the walk, the group came upon a drainage channel which was hidden by overgrown foliage. *Id.* The off-duty servicemember fell into the channel and was crushed to death. *Id.* In deciding whether the *Feres* doctrine barred the case, the Ninth Circuit looked at four factors to see if the injury was incident to service: (1) the place of the negligent act; (2) the duty status of the plaintiff when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a servicemember; and (4) the nature of the plaintiff's activities at the time of the negligent act. *Id.* at 1440. The Ninth Circuit also stated that the most relevant inquiry is "whether or not the servicemember's activities at the time of injury are of the sort that could harm the disciplinary system if litigated in a civil action." *Id.* at 1441. After examining all of these factors and addressing relevant inquiries, the court found that the servicemember's widow had an FTCA action that was not *Feres* barred. Interestingly, the government refused to appeal the decision.

The Eleventh Circuit also looks beyond the duty status of a servicemember at the time of their injury. In a case involving a faulty ventilation system in a military apartment building, a servicemember and his wife filed an FTCA claim for extensive injuries resulting from carbon monoxide poisoning. *Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994). In determining whether *Feres* barred the suit, the court focused on three factors: (1) the duty status of the servicemember; (2) the situs of the injury; and (3) the activity the servicemember was engaged in at the time of the injury. *Id.* at 1560. After look-

ing at all of these factors, the Eleventh Circuit then looked at the "totality of the circumstances" to determine if *Feres* applied. *Id.*

In *Elliott*, the Eleventh Circuit also inquired into the three rationales for the *Feres* doctrine. *Id.* at 1559. After dismissing the first and second rationales as "no longer controlling" and "if not completely erroneous," the court then focused on the effect of the suit on military discipline. *Id.* Significantly, the court found that "providing and maintaining single-family housing for military personnel does not involve the federal judiciary in sensitive military affairs or the 'second-guessing of military orders.'" *Id.* at 1560. Consequently, the court ruled that the *Feres* doctrine did not bar the plaintiff's suit.[1] *Id.* at 1563. Incidentally, one of the three original *Feres* cases decided was also a housing case very similar to *Elliott*. *See*: *Feres v. United States*, 340 U.S. 135 (1950). *Jones Appeal* is a medical malpractice claim just as were the other two consolidated *Feres* cases. Surely, if the housing cases should fall, so should the medical malpractice cases. The *Elliott* decision has not appeared to have had the adverse affect on military discipline as the argument for barring the claim seemed to implicate. Hence, it appears that not only are the circuits in disagreement on which factors to apply when deciding whether a suit is barred by *Feres*, but there is also a serious question as to the validity of the articulated rationales of the *Feres*

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[1] Petitioner does note, however, that the Eleventh Circuit decided to then hear the case *en banc*, but because the vote *en banc* was evenly split, the district court's decision that the plaintiff's claims were not *Feres* barred, was affirmed by operation of law. *Elliott v. United States*, 37 F.3d 617 (11th Cir. 1994).

doctrine, when applied solely on the basis of active duty status.

The Fourth Circuit has also expressly rejected treating active duty status as a dispositive factor. In a medical malpractice case, for example, a serviceman who was on excess leave awaiting the ruling of an appeal of his court-martial, sought medical treatment at a military hospital. *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989). The plaintiff argued that since his injury occurred while he was on excess leave pending discharge, his injury was not "incident to service." *Id.* at 312. Significantly, the court in making it's decision stated that "the plaintiff's active duty status, standing alone, is insufficient to invoke the *Feres* doctrine's bar." *Id.* at 311. Instead of treating duty status as the decisive factor, the Fourth Circuit, unlike the Seventh Circuit, followed the conclusions from other cases that stated the receipt of medical treatment at military facilities is "incident to service." *Id.* While noting that four justices on the United States Supreme Court believed that *Feres* was wrongly decided, the Fourth Circuit nonetheless felt obliged to apply precedent. *Id.* at 313. While the Fourth Circuit dismissed the suit, it declined to use active duty status as a dispositive factor.

The Fifth Circuit also does not use active duty status in a such a determinative way that creates a "bright-line" conclusive test. In *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988), a servicemember on the Temporary Disability Retired List (TDRL) jumped from a window of an Army Medical Center. The serviceman's widow brought an FTCA suit claiming that the medical personnel at the hospital failed to prevent his suicide. *Id.* at 724. In response to the government's contention that the

Feres doctrine barred her suit, the plaintiff argued that injuries occurring while the servicemember is on TDRL are not "incident to service." *Id.* The Fifth Circuit agreed with the plaintiff and specifically stated that "a listing on the TDRL [is not] considered the equivalent of active duty." *Id.* at 726. Additionally and contrary to the Fourth Circuit, the court ruled that the fact that the servicemember was receiving disability pay and was eligible for treatment in a government hospital were not sufficient reasons to warrant a *Feres* bar. *Id.* at 727. Consequently, the fact that the servicemember was injured while in a military hospital and was on active duty although temporarily disabled, was not dispositive.

The standards in the Fourth, Fifth, Ninth and Eleventh Circuits directly conflict with the standards in the First, Seventh and Tenth Circuits. In the First and Tenth Circuits, which are in accordance with the Seventh Circuit in this case, the *Feres* inquiry ends and the person is found to have been acting "incident to service" once it is determined that the servicemember was on active duty.

In a First Circuit case, a serviceman, who had injured himself playing basketball while off-duty, sought damages against military and civilian doctors for services negligently rendered in a military hospital. *Borden v. Veterans Administration*, 41 F.3d 763 (1st Cir. 1994). The court ruled that the decision to apply the "incident to service" test *depended* on the plaintiff's military status. *Id.* at 763 (emphasis added.) The First Circuit also decided that the plaintiff's claim was barred, regardless of the fact that he was off-duty at the time of the injury, because he was an active servicemember and such persons are entitled to medical treatment at military hos-

pitals. *Id.* at 763-64. After determining that active servicemembers are entitled to such medical benefits, the First Circuit ended its inquiry and barred the servicemember's suit.

The Tenth Circuit also finds that active duty status automatically triggers the *Feres* bar to a servicemember's suit. In one particular case, a captain in the Air Force was injured while on terminal leave anticipating his retirement. *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987). Upon entering the hospital, the captain was placed on the Temporary Disability Retired List (TDRL). *Id.* at 1011. The plaintiff argued that the nature of his active duty was tantamount to military leave or discharge and therefore his FTCA suit should not be barred. *Id.* at 1012. In response, the Tenth Circuit first stated that "the *Feres* doctrine is *predicated* upon his military status at the time of the negligent act." *Id.* at 1012. (emphasis added). The court also felt that the nature of the servicemember's involvement with the military at the time of injury did not change the fact that a person is still on active duty. *Id.* at 1013. In conclusion, the court stated that "once it is determined that a servicemember . . . was on active duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial inquiry ends." *Id.* at 1014. Hence, Captain Madsen was automatically barred from a FTCA suit, because his negligent treatment occurred while he was on active duty, albeit temporarily disabled.

This Court established that the *per se* application of the *Feres* doctrine in military claims was eliminated in *United States v. Shearer*, 473 U.S. 52 (1985). In that case, this Court specifically stated:

> "The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Id.* at 57.

Consequently, focusing only on the active duty status of a servicemember allows some circuits to retain the "bright-line" rule that was precisely abolished by this Court.

An examination of the standards between the circuits immediately reveals that servicemembers have a better chance of surviving a *Feres* attack in the Fourth, Fifth, Ninth and Eleventh Circuits than in the First, Seventh and Tenth Circuits. Consequently, injured servicemembers are only encouraged to "shop" the circuits to find those courts that employ more encompassing and liberal standards. Such a disparity between the circuits should be addressed by this Court to prevent the grave and inequitable results that currently plague servicemembers throughout this country. These differing standards that have produced the incentive to "shop the circuits" have developed partly as a result of the illogical application of certain rationales of the *Feres* doctrine.

B. Application of the Rationales for the *Feres* Doctrine Induces Divergent Opinions Amongst the Circuits

The ever-growing divergent *Feres* type decisions and illogical outcomes result from applying rationales for the doctrine. The three rationales for the *Feres* doctrine that were articulated in the last Supreme Court decision of *United States v. Johnson*, 481 U.S. 681 (1987) are: (1) the relationship between the Government and members

of its armed forces is distinctively federal in character; (2) the existence of . . . generous statutory disability and death benefits . . .; and (3) servicemember suits are the types of claims that would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.

The irrationality of these reasons was best articulated in Justice Scalia's lengthy dissent in *Johnson. Supra.* Petitioner could not adequately rephrase what Justice Scalia wrote and therefore adopts his reasoning. Petitioner, however, wishes to briefly demonstrate to this Court just how illogical the rationales are applied in the medical malpractice context since *Johnson. Supra.*

The second rationale, which has serious logical flaws, states that since other generous statutory benefits already exist, an FTCA suit is unnecessary. This Court has put much emphasis on the fact that Congress passed the FTCA with the intention of providing for those who were not adequately provided for. The key phrase in this sentence is "adequately provided for." Courts have concluded that the Veteran's Act compensation is far superior to state worker compensation laws. *See: Kendrick v. United States*, 877 F.2d 1201 (4th Cir. 1989) and *Sidley v. United States*, 861 F.2d 988 (6th Cir. 1988). Consequently, the rationale concludes that a personal injury suit is unnecessary. But are military members adequately compensated for their injury, disability and pain and suffering? Furthermore, the fact that numerous lawsuits are filed each year to seek compensation for injuries sustained while servicemembers are coincidentally employed in the United States military, answers this question as a resounding "no."

The FTCA was created, in part, to avoid the introduction of individual congressional bills for the purpose of compensating victims of federally employed tortfeasors. This purpose is defeated by the *Feres* doctrine. A search of congressional legislation would reveal that bills are being initiated to compensate military members who have been the subject of a tort while serving in the military. *See*: H.R. 221, 103rd Cong., 1st Sess. (1993) and H.R. 546, 104th Cong., 2nd Sess. (1996). If Congress intended to prevent wasting time on individual bills, they should not be forced to spend valuable time "litigating" individual claims. The reason for this "waste of time" lies in the judicially created *Feres* doctrine.

Feres generally allows military doctors to remain comfortable in the fact that they cannot civilly be held liable for committing malpractice against their patients. Military doctors have no incentive to take medically accepted precautions when treating a patient, because the physician knows that they cannot be held accountable for committing malpractice. Doctors, who are immune from prosecution, almost have a license to commit malpractice. *Feres*, in a medical malpractice setting, defeats the purpose of Congress enacting the FTCA.

The third rationale also seriously suffers from illogic. For example, if a veteran patient is wheeled into the emergency room of a veteran's hospital, the doctors must adhere to the medical standards and guidelines regardless of whether the patient is on the temporarily disabled list (TDRL) or is permanently disabled. However, in the world of *Feres*, an active duty servicemember whose surgery is performed with gross negligence is only able to successfully maintain an FTCA suit if he or she is

wearing the right hat in the right circuit. In some circuits, a servicemember can maintain a suit if he/she is on the TDRL list. *See: Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988). In other circuits, the same person would not have a chance of success. *See*: *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987). A judge, when deciding cases involving serious injury to military personnel, must determine how the military is more likely to face intrusive interference from civil courts if the patient is off duty than if the person is on active duty. Although medical principles will be scrutinized by the Court if the person has been discharged from the military, the claim can be allowed despite the *Feres* doctrine. Yet, when an active duty servicemember suffers the same injury, the courts create the fiction that sensitive military affairs may be improperly violated. The courts are not scrutinizing medical guidelines in active duty cases as they do in discharged servicemember cases. Not only does this not make any sense, but it is also unfair to our military personnel. The policies and discipline of military doctors should be the same regardless if the person is discharged from the military, temporarily or permanently disabled, or even on active duty. The same policies and guidelines should be applied when a procedure is incorrectly performed regardless of the status of the patient. Military discipline and the chain of command are not affected any differently if the court can peruse medical standards in a permanently disabled servicemember case as opposed to an active duty member case. Military physicians should be judged by the same medical standards that civilian doctors are required to uphold.

If Congress had specifically provided in the FTCA that military personnel on active duty were barred from any suits against the government or government personnel, this Court might properly have condoned the bright-line test now being applied by certain circuits. Congress, however, limited the government's immunity to tort claims by military personnel to "combatant activities . . . during times of war." The *Feres* doctrine, itself, may be criticized as an intrusion into the legislative function. The application of the doctrine by courts to bar servicemembers from the right to make claims for injuries sustained at the hands of negligent physicians is outrageous.

CONCLUSION

Petitioner is aware that the Supreme Court has denied petitions for certiorari brought by other military personnel that have *Feres* barred claims and that Congress has been unsuccessful in legislating an end to the *Feres* doctrine. Petitioner here seeks only a modification of *Feres* to allow for military personnel to sue the government and its health care providers for medical malpractice. Immunity from medical malpractice claims can only reduce the quality of military medical care in general. Additionally, such immunity provides a haven for incompetency. We can but concur with the statement of Justice Felix Frankfurter that sovereign immunity is a "doctrine without moral validity" and an "anachronistic survival of monarchial privilege [which] runs counter to

democratic notions of the moral responsibility of the state." *Kennecott Copper Co. v. State Tax Commission*, 327 U.S. 573, 580-81 (1946).

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-1975

DONZELL JONES,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, DR. YOUNAI, and DR. SHARMA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 404—**Blanche M. Manning**, *Judge*.

ARGUED MARCH 5, 1997—DECIDED APRIL 24, 1997

Before FLAUM, MANION, and KANNE, *Circuit Judges*.

FLAUM, *Circuit Judge*. In addition to serving as a sergeant in the United States Army, Donzell Jones was an accomplished track and field athlete. His athletic abilities led to his being temporarily assigned to the San Francisco/Oakland area to allow him to participate in trials for the 1992 United States Military Olympics team. While on this assignment, Jones underwent surgery at Oakland Naval Hospital to relieve chronic abdominal pain. Rather than solving his medical problems, however, the surgery compounded them: during the procedure both his legs were injured, allegedly because of

medical malpractice, and the injuries ended his military and athletic careers.

Jones brought suit against the United States and six doctors (four naval and two civilian) under the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2671 *et seq*. The United States was substituted as party defendant in place of the four naval doctors. The district court granted the United States's motion to dismiss the claim against it for lack of subject matter jurisdiction under *Feres v. United States*, 340 U.S. 135 (1950); the two civilian doctors (Younai and Sharma) were never served with process and the claims against them were never adjudicated. Jones appeals the district court's decision to apply *Feres* to bar his claims. We affirm.

I.

Before we reach the *Feres* question, we must address the United States's motion to dismiss the appeal for lack of jurisdiction. Courts of appeals may only hear appeals from "final decisions" of district courts. 28 U.S.C. § 1291. The United States contends that the district court never rendered such a decision in this case because it never disposed of the claims against the two unserved individual defendants.

We most recently addressed whether the presence of unserved defendants negates the finality of an order in *Ordower v. Feldman*, 826 F.2d 1569, 1573 (7th Cir. 1987), in which we noted a division of authority on the question:

> The Third Circuit has held that the presence of unserved defendants is not a bar to finality because an unserved defendant is not a "party" to the lawsuit. *See De Tore v. Local #245*, 615 F.2d 980, 982 n.2 (3d Cir. 1980). On the other hand, the Eighth Circuit has held that the presence of unserved defendants pre-

vents a decision from being considered final if the plaintiff is free to attempt further process on those defendants. *See Haley v. Simmons*, 529 F.2d 78, 79 (8th Cir. 1976); *but see Patchick v. Kensington Publishing Corp.*, 743 F.2d 675, 677 (9th Cir. 1984) (stating that decision may be final when unserved defendants are present because "[i]n such circumstances there is no reason to assume that there will be any further adjudication of the action").

Having noted the division, however, in *Ordower* we declined to decide which approach should govern in this circuit. Given that "[a]ny attempt by plaintiffs to serve the complaint on the unserved defendants would be clearly untimely under Rule 4(j) and any new complaint filed by plaintiffs would be dismissed as time-barred," we held that in either case the judgment would be considered final. *Id.*; *see also Otis v. City of Chicago*, 29 F.3d 1159, 1165 (7th Cir. 1994) (en banc) ("A series of our cases holds that when, from a practical perspective, the case is over, the loser may appeal.").

The government's attempts to distinguish *Ordower* are unavailing. Any service now attempted on the individual defendants in this litigation certainly would be untimely, and any new complaint against them would be barred by the statute of limitations, given that in suits against health care providers California has established a limitation period of three years from the date of injury. CAL. CIV. PRO. CODE § 340.5. As stated in *Ordower*, "For all practical purposes, plaintiffs' case against the unserved defendants is over." The district court's order was a final decision appealable under 28 U.S.C. § 1291.

II.

Having satisfied ourselves that we have jurisdiction over the appeal, we now consider whether the district court correctly applied *Feres* to bar this action. Dismissal

under *Feres* amounts to dismissal for lack of subject matter jurisdiction, a question of law that we review *de novo*. *Duffy v. United States*, 966 F.2d 307, 310 (7th Cir. 1992).

In *Feres v. United States*, 340 U.S. 135, 146 (1950), the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The Court reaffirmed *Feres* in *United States v. Johnson*, 481 U.S. 681 (1987), where it explained three broad rationales that support *Feres*: (1) the need to protect the distinctively federal relationship between the government and the armed forces, which could be adversely affected by applying differing tort laws; (2) the existence of statutory compensatory schemes; and (3) the need to avoid interference with military discipline and effectiveness. *Johnson*, 481 U.S. at 688-91; *Stephenson v. Stone*, 21 F.3d 159, 162 (7th Cir. 1994). "The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *United States v. Shearer*, 473 U.S. 52, 57 (1985). "The dispositive inquiry remains whether the service-member stand[s] in the type of relationship to the military at the time of his or her injury that the occurrences causing the injury arose out of activity incident to military service." *Stephenson*, 21 F.3d at 162.

Jones argues that *Feres* should not apply in this case because he was not participating in a military activity at the time he had to undergo surgery (that is, that the injury was not "incident to service"); rather, he contends, he was trying out for the United States Military Olympics team, an activity that had no relation to military service. We rejected a similar argument in *Walls v. United States*, 832 F.2d 93 (7th Cir. 1987). There, a serviceman claimed that he was not acting incident to military service where his injury resulted from a plane crash

during an "Air Force Aero Club" activity. The "Air Force Aero Club" is a "recreational activity to promote morale" overseen by the Air Force in which "active membership" is available only to active-duty military personnel in the United States Armed Forces. *Id.* at 94 n.2. Because the serviceman was subject to military jurisdiction and taking advantage of military privileges generally restricted to the military, we concluded that he was acting "incident to service" and thus his FTCA suit against the government was barred. *Id.* at 95-96.

In fact, courts have often concluded military personnel acted "incident to service" and applied the *Feres* bar in cases arising from servicemembers taking advantage of recreational military activities or other military perquisites because their use of the facilities was a consequence solely of their status as members of the military. *See Herreman v. United States*, 476 F.2d 234 (7th Cir. 1973) (serviceman took advantage of status to fly home from vacation on military aircraft); *Lauer v. United States*, 968 F.2d 1428 (1st Cir. 1992) (enlistee "on liberty" struck by car while walking on Naval road); *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986) (canoe obtained from Navy Special Services facility); *Warner v. United States*, 720 F.2d 837 (5th Cir. 1983) (per curiam) (injury suffered on base after serviceman given permission to take the day off); *Woodside v. United States*, 606 F.2d 134 (6th Cir. 1979) (Aero Club member receiving instruction toward commercial pilot's license); *Hass v. United States*, 518 F.2d 1138 (4th Cir. 1975) (horse obtained from stables owned and operated by government for benefit of servicemembers). By contrast, where suits have been allowed to proceed, the military personnel involved were not taking advantage of any military program or status, but simply engaging in activities on the same grounds as civilians. *See Brooks v. United States*, 337 U.S. 49 (1949) (off-duty serviceman in auto accident on highway); *Dreier v. United States*, 106 F.3d 844 (9th

Cir. 1997) (returning on openly accessible path from publicly-used beach); *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995) (two off-duty personnel involved in off-base auto accident); *Kelly v. Panama Canal Comm'n*, 26 F.3d 597 (5th Cir. 1994) (off-duty sailing in boat acquired from civilian club); *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987) (auto-motorcycle accident on public road).

Jones further argues that this case involves only malpractice allegations and thus does not sufficiently invoke the concerns expressed by *Johnson*. This argument too must fail. Not only did two of the cases consolidated and decided with *Feres* itself bar medical malpractice allegations, 340 U.S. at 137, 146, but courts have routinely applied *Feres* to bar medical malpractice claims that arose from treatment by military doctors of active-duty personnel. *See, e.g., Collins v. United States*, 642 F.2d 217 (7th Cir. 1981); *Cutshall v. United States*, 75 F.3d 426 (8th Cir. 1996); *Hayes v. United States*, 44 F.3d 377 (5th Cir.), *cert. denied*, 116 S. Ct. 66 (1995); *Borden v. Veterans Administration*, 41 F.3d 763 (1st Cir. 1994); *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989); *Madsen v. United States*, 841 F.2d 1011 (10th Cir. 1987); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Rayner v. United States*, 760 F.2d 1217 (11th Cir. 1985) (per curiam). This is true even where the underlying injury that brought the servicemember to the hospital was not caused by service, *Hayes*, 44 F.3d at 379 (hernia); *Borden*, 41 F.3d at 763 (injury from playing basketball), or was an elective medical procedure, *Rayner*, 760 F.2d at 1219. As stated by one court, "once it is determined that a servicemember . . . was on active duty during the time military medical treatment was rendered, the treatment is necessarily incident to service and judicial inquiry ends." *Madsen*, 841 F.2d at 1014.

Here, Jones was acting subject to military jurisdiction: he was temporarily assigned by the military to the San Francisco/Oakland area. There is no indication that he

was not on active duty status, and "we have consistently found that a service-member's injury is incident to military service whenever the injury is incurred while the individual is on active duty or subject to military discipline." *Stephenson*, 21 F.3d at 162. Further, Jones was in the area to take advantage of a military perquisite, the chance to participate in the United States Military Olympics trials. His injury occurred at a military hospital, at which he was being treated as an Army patient under Army medical benefits. *Feres* bars this action.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Dated February 27, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONZELL JONES,	)	
	)	
Plaintiff,	)	
v.	)	No. 95 C 0404
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

Background

Plaintiff brings this claim under the Federal Tort Claims Act (FTCA) 28 U.S.C. §§ 2671. Donzell Jones, who at the time of the alleged offense was a member of the United States Army, claims that he was the victim of medical malpractice while under the care of the Oakland Naval Hospital. Specifically, plaintiff claims that he underwent surgery there on June 22, 1992. Plaintiff claims that during the surgery it became necessary for "leg holders" to be placed on his legs for purposes of protecting his own safety. Further, these "leg holders" were supposed to be monitored and periodically loosened during lengthy surgeries, such as the one plaintiff underwent, in order to avoid permanent damage from compression of blood circulation to the lower legs. Plaintiff claims that these "leg holders" were neither loosened

nor monitored properly during his surgery, and thus, he has suffered permanent injury to his legs, and was forced to resign from active military service.

The defendant, United States (U.S.), seeks to have this case dismissed on the basis of the doctrine set forth in *Feres v. United States*, 340 U.S. 135 (1950). The rationale of defendant is that the injury suffered by plaintiff was incidental to his military service. The court grants defendant's motion.

Discussion

The Federal Tort Claims Act provides in relevant part that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .

28 U.S.C. § 2674 (1988). The Act also provides a specific exception to this general waiver of sovereign immunity, stating that the government shall not be liable for "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* at § 2680(j) Despite the terms of this latter provision, the U.S. Supreme Court has determined that the military exception to the FTCA is much broader than at first glance. In its seminal decision in *Feres*, the Court unanimously held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 137.

Plaintiff insists that *Feres* is on somewhat shaky ground in light of the plain language of the military ex-

ception of 28 U.S.C. 2680(j). However, as the Seventh Circuit has noted, the *Feres* doctrine has become "'black letter law'". *See*, *Stephenson v. Stone*, 21 F.3d 159, 161 (7th Cir.1994); and *Duffy v. United States*, 966 F.2d 307, 312 (7th Cir.1992) (noting that *Feres* is "alive and well"). Further the U.S. Supreme Court had occasion to reaffirm the doctrine as recently as 1987. *United States v. Johnson*, 481 U.S. 681 (1987).

The Seventh Circuit has strictly enforced the *Feres* doctrine for the following reasons: (1) the doctrine protects the distinctive federal relationship between the government and the armed forces, which may be undermined by idiosyncracies between the individual states' distinctive tort laws; (2) the doctrine promotes the existence of other statutory systems of compensation for service members; and (3) promotes military discipline and effectiveness. *See*, *Duffy*, 966 F.2d at 312 (7th Cir.1992); and *M.M.H. v. United States*, 966 F.2d 285, 287 (7th Cir. 1992).

The dispositive *Feres* inquiry thus remains whether the service member stood in such a relationship to the military at the time of his injury that the circumstances giving rise to his injury arose out of activity incident to military service. *Stephenson*, 21 F.3d at 161.

In the present case, plaintiff attempts to avoid any application of the *Feres* doctrine by arguing that it has no place in the medical malpractice field. Because *Feres* and its progeny are concerned with questions of military discipline, it should not apply to the personal medical needs of a serviceman being treated in a Naval Hospital, where medical decisions, rather than military, are controlling.

In light of overwhelming precedent, this court declines to make a medical malpractice exception to application of the *Feres* doctrine. Here, plaintiff enjoyed the use of the naval hospital solely by virtue of his status as a serviceman, and the doctors who treated him were subject to military orders. *Milang v. United States*, 817 F.2d 533, 535 (9th Cir.1987) (per curiam), *cert. denied*, 485 U.S. 987 (1988).

Further, *Feres* itself was consolidated and decided with two other cases: *Jefferson v. United States* and *United States v. Griggs*. Like the present case, both of these involved allegations of medical malpractice by doctors who were members of the Armed Forces. The Court stated that "the common fact underlying the three cases [was] that each claimant, while on active duty and not on furlough, [had] sustained injury due to negligence of others in the armed forces." *Feres*, 340 U.S. at 138. Under such circumstances, the Court concluded that there could be no government liability under the FTCA.[1]

Lastly, plaintiff urges this court to modify a doctrine announced by the United States Supreme Court 46 years ago, and reaffirmed as recently as 1987. In his brief, plaintiff states that "a trial court can, if it believes that

---

[1] Much of plaintiff's brief is devoted to a criticism of the Supreme Court's decisions in this area, relying especially on Justice Scalia's vociferous dissent in *Johnson* and a Ninth Circuit case, *Atkinson v. U.S.*, which was later withdrawn in light of the Supreme Court's decision in *Johnson*. *See*, *Atkinson v. United States*, 804 F.2d 561 (9th Cir.1986), *modified*, 813 F.2d 1006 (9th Cir.1987). Although both of these cases may present excellent critiques of some of the weaknesses of the *Feres* doctrine, neither of them constitutes controlling authority.

the rule is harsh, unfounded and/or inequitable, or that the rule would be different under the present makeup of the court, overrule the *Feres* doctrine as it applies to these facts."

This court is unaware of such a broad grant of authority. Rather, the standard this court follows for declaring a decision or doctrine of a higher court invalid or defunct was set forth by the Seventh Circuit in *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir.1986):

> The standard for declaring a decision or doctrine of a higher court defunct is . . . whether the lower court is certain or almost certain that the decision or doctrine would be rejected by the higher court if a case presenting the issue came before it. This is a high standard and will rarely be met. Any looser standard, however, would unsettle the law. The expansion of the federal courts makes it more rather than less important that lower courts respect the authority of higher ones in order to maintain a minimum of coherence in the law.

806 F.2d at 741.

This court is nowhere near certain that *Feres* would be rejected by a higher court. As previously stated, the Seventh Circuit continues to follow the doctrine. *Stephenson*, 21 F.3d at 159. Further, the Supreme Court has recently reaffirmed the *Feres* line of cases. *Johnson*, 481 U.S. at 681.

Lastly, as the First Circuit has stated, "the issue of whether to overrule *Feres* is clearly for Congress or the Supreme court, not for [a lower] court. [This court] may not overrule [it] even were we disposed to do so." *Morey v. United States*, 903 F.2d 880, 883 (1st Cir.1990).

Conclusion

For the foregoing reasons, the court grants defendant's motion to dismiss for lack of subject matter jurisdiction.

ENTER:

BLANCHE M. MANNING
United States District Court

DATED: FEB 2 7 1996

APPENDIX C

[Dated January 19, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONZELL JONES, Plaintiff, v. UNITED STATES OF AMERICA, DEPARTMENT OF DEFENSE OF THE UNITED STATES - NAVY DEPARTMENT, DR. H. R. BOHMAN, DR. S. YOUNAI, DR. HARKABUS, DR. SHARMA, DR. LEFEVER, and DR. SEELY, Defendants.	)	No. 95 C 0404 Judge Manning Magistrate Judge Gotschall

COMPLAINT AT LAW

NOW COMES the plaintiff, DONZELL JONES, by and through his attorneys, BASKIN, SERVER, BERKE, WEINSTEIN & SPIRO, and complaining of the defendants, UNITED STATES OF AMERICA, DEPARTMENT OF DEFENSE OF THE UNITED STATES - NAVY DEPARTMENT (hereinafter "USA"), DR. H.R. BOHMAN, DR. S. YOUNAI, DR. HARKABUS, DR. SHARMA, DR. LEFEVER, and DR. SEELY, states as follows:

COUNT I

1. This action arises under the Federal Tort Claim Act 28 U.S.C. §§ 2671-2680, said claim having been

made March 20, 1994 (Exhibit A) and having been denied July 20, 1994 (Exhibit B), and this claim being brought within six months as required under 28 U.S.C. § 2401(b).

2. Plaintiff, DONZELL JONES, is a citizen of the United States of America and is now a resident of the City of Matteson, County of Cook, State of Illinois, all part of the Northern District of Illinois of the United States District Court.

3. This cause is brought in the Northern District of Illinois pursuant to the provisions of the 28 U.S.C. §§ 1391(e)(3) and no real property is involved in this action.

4. At all times mentioned herein, the defendants BOHMAN, YOUNAI, HARKABUS and SHARMA were duly licensed medical doctors practicing as physicians and surgeons and were staff physicians at the Oakland Naval Hospital, in the City of Oakland, Alameda County, State of California, and were the agents and employees of the USA.

5. At all times mentioned herein, the defendants LEFEVER and SEELY were duly certified anesthetists employed by defendant USA at the Oakland Naval Hospital, in said city, county and state, and were the agents and employees of the USA.

6. The plaintiff was a member of the U.S. Army permanently stationed in Ft. Riley, Kansas and temporarily assigned to the San Francisco/Oakland, California area for the purpose of participating in the United States Military Olympic try outs.

7. The plaintiff, DONZELL JONES, was a patient at the Oakland Naval Hospital under the care of defendant physicians from June 19, 1992 until July 18, 1992 for a non service related condition, to wit, chronic ulcerative colitis, and was treated surgically on June 22, 1992 for rectal mucosectomy, total abdominal colectomy, creation of ileal S-pouch and diverting ileostomy.

8. The surgery was performed by BOHMAN, assisted by YOUNAI, HARKABUS and SHARMA. LEFEVER and SEELY were the anesthetists who provided anesthesia during said surgery.

9. The plaintiff had no choice in the selection of all physicians and they were assigned to him without any regard to his choice.

10. During the operation it became necessary to place "leg holders" or compression leggings on the plaintiff's legs to keep blood from pooling in the lower extremities.

11. It is essential to the well being of the patient that such "leg holders" be monitored and periodically loosened during lengthy surgery so as to avoid permanent damage from compression of blood circulation to the lower legs.

12. At all relevant times herein set forth, the defendants and each of them, held themselves out to the plaintiff, DONZELL JONES, to possess the requisite skill, competence and knowledge to properly care for and treat his condition of ill being.

13. The defendants, BOHMAN, YOUNAI, HARKABUS and SHARMA, physicians and surgeons, owed to the plaintiff herein a duty to exercise the same care in the providing of surgical care as was the standard of care expected of physicians and surgeons in like and similar

circumstances in the community where the services were performed.

14. During the course of said operation, the "leg holders" were not periodically loosened or otherwise not properly monitored, permitting and causing the circulation to his lower legs to be compromised.

15. At said time and place, the defendant USA, by and through its agents and employees, the individual defendants, and the defendants BOHMAN, YOUNAI, HARKABUS, SHARMA, LEFEVER and SEELY, individually:

a. Failed to periodically loosen the "leg holders" to the extent necessary to avoid circulatory damage to the plaintiff's lower legs;

b. Failed to properly maintain the "leg holders" in a proper and safe position on plaintiff's legs;

c. Failed to properly monitor the "leg holders".

16. As a direct and proximate result of one or more of the aforesaid acts or omissions of the defendants, the plaintiff, DONZELL JONES, was caused to suffer bilateral compartment syndrome, and has in the past and with reasonable certainty will continue in the future to suffer pain, disability and disfigurement; and he has incurred or become liable for large sum of money for necessary additional medical and surgical care, and he has lost earnings which he otherwise would have made, and was required to resign from active military service.

17. Plaintiff's care and treatment was not related to maintaining military discipline, nor rendered during a time of war.

18. This cause ought not be controlled or decided under the "Feres Doctrine" *Feres v. United States*, 430 U.S. 135 (1940), since the facts and circumstances of this cause are distinguishable, and further, the "Feres Doctrine" is incorrect and inequitable as applied to this case and should be revisited.

WHEREFORE, plaintiff, DONZELL JONES, prays that judgment be entered in his favor and against the defendants, UNITED STATES OF AMERICA, DEPARTMENT OF DEFENSE OF THE UNITED STATES - NAVY DEPARTMENT, DR. H.R. BOHMAN, DR. S. YOUNAI, DR. HARKABUS, DR. SHARMA, DR. LEFEVER and DR. SEELY, in the amount of NINE HUNDRED THOUSAND ($900,000.00) DOLLARS and his costs.

COUNT II

1-17. Plaintiff realleges paragraphs 1-17 of Count I as paragraphs 1-17 of Count II as if fully set out herein.

18. Application of the "Feres Doctrine" is denial of plaintiff's rights to due process of law and thus violates his Constitutional rights.

WHEREFORE, plaintiff, DONZELL JONES, prays that judgment be entered in his favor and against the defendants, UNITED STATES OF AMERICA, DEPARTMENT OF DEFENSE OF THE UNITED STATES - NAVY DEPARTMENT, DR. H.R. BOHMAN, DR. S. YOUNAI, DR. HARKABUS, DR. SHARMA, DR. LEFEVER and DR. SEELY, in the amount of NINE HUNDRED THOUSAND ($900,000.00) DOLLARS and his costs.

C-6

BASKIN, SERVER, BERKE,
WEINSTEIN & SPIRO

BY:_____
Attorneys for Plaintiff

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Attorney No. 90091

APPENDIX D

28 U.S.C. § 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to–

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or inter-

ference with contract rights; *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.